Supreme Court, U.S.
FILED
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(2)

No. 97-610

In the

Supreme Court of the United States

October Term, 1997

STEVEN M. KRAMER,

Petitioner,

v.

NEW JERSEY SUPREME COURT, et al.,

Respondent.

On Petition For A Writ of Certiorari To The New Jersey Supreme Court

Brief of the Respondent New Jersey Supreme Court In Opposition To The Petition For Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

1. Do the New Jersey attorney disciplinary proceedings resulting in Petitioner's six month suspension from the practice of law in the state violate the Supremacy, Due Process, Privileges and Immunities, or Equal Protection Clauses of the United States Constitution where Petitioner was provided with ample opportunity to fully and fairly litigate his constitutional claims in those proceedings?

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Brief of the Respondent Supreme Court of New Jersey In Opposition To Petition For Writ Of Certiorari

COUNTERSTATEMENT OF THE CASE

By an Order entered on April 23, 1997, the New Jersey Supreme Court suspended Petitioner pro se, Steven M. Kramer from the practice of law in New Jersey for six months, commencing May 16, 1997. (App.13). The suspension order was the final step in a lengthy disciplinary process, in which Petitioner was charged with failing to abide by his client's litigation decisions in violation of R.P.C. 1.2(a), and for acquiring a proprietary interest in his client's cause of action, in violation of R.P.C. 1.8(j).

Petitioner's ethical misconduct arose out of his representation of Jon E. DeLuca in connection with litigation that Mr. DeLuca ultimately brought against Olivia Newton-John, Patricia Farrar and Koala Blue, Inc. for damages which Mr. DeLuca and his company allegedly sustained through business dealings with those parties. Defendants in that action successfully moved for summary judgment, and the district court entered judgment against Mr. DeLuca for costs and counsel fees totaling $110,842.00. Following the entry of summary judgment, Mr. DeLuca indicated to Petitioner his desire to settle the litigation. Petitioner instead prevailed upon Mr. DeLuca to file for Chapter Eleven bankruptcy in order that Petitioner could continue to pursue the pending appeal of the award of summary judgment in the Ninth Circuit Court of Appeals.

Petitioner presented Mr. DeLuca with a modified retainer agreement dated May 18, 1989, whereby Petitioner agreed to be responsible for advancing the expense associated with the bankruptcy, and Mr. DeLuca in turn agreed "that no settlement negotiations of less than $100 M will take place without [Petitioner's] concurrence." (App. 33).

After entering into the modified retainer agreement, Mr. DeLuca again expressed to Petitioner his misgivings about the litigation, and his dissatisfaction with Petitioner's handling of it. Petitioner failed to accede to Mr. DeLuca's repeated requests to settle the litigation. Ultimately, Mr. DeLuca filed a pro se substitution of attorney with the Ninth Circuit, dismissed the appeal and settled the underlying litigation with the defendants. (App. 25).

Petitioner thereafter sued Mr. DeLuca for breach of contract in the U.S. District Court for the District of New Jersey. By a Memorandum and Order entered August 31, 1990, the district court granted Mr. DeLuca's motion for summary judgment. (App. 43). The court further noted Petitioner's possible violations of R.P.C. 1.2(a) and R.P.C. 1.8(j) and referred the matter to the New Jersey attorney ethical authorities for investigation. (App. 48).

An overview of the attorney discipline process in New Jersey and a procedural summary of the proceedings that culminated in the suspension order at issue are set forth below.

A. Overview of Attorney Disciplinary System in New Jersey

Attorneys authorized to practice law in the State of New Jersey are subject to the disciplinary jurisdiction of the New Jersey Supreme Court. N.J. Const., Art. 6, §2, ¶3. N.J. Ct. Rule 1:2-1, et seq.. The New Jersey attorney disciplinary structure is a three-tiered system which includes the following levels of enforcement: (1) 17 regionalized District Ethics Committees ("DEC) and a statewide Office of Attorney Ethics ("OAE"), (2) a statewide Disciplinary Review Board ("DRB"); and (3) the Supreme Court of New Jersey.

At the first tier of review, District Ethics Committees are charged with investigating allegations of attorney misconduct. N.J. Ct. Rule 1:20-3. Following initial screening and investigation into the allegations of a particular grievance, a written report of the investigation is submitted to the Ethics Committee Chair for a determination as to whether there is a reasonable prospect of finding misconduct by clear and convincing evidence. If there is such a finding, the attorney respondent may agree to discipline by consent or the Ethics Committee may file a complaint. The respondent is required to answer the complaint within 21 days of service. Following a hearing before a hearing panel consisting of three Ethics Committee members, the panel deliberates and either dismisses the complaint or determines that the lawyer has been guilty of misconduct and recommends a public admonition, public reprimand, term of suspension, or disbarment. In July of 1994, the New Jersey Court Rules were amended so as to abolish private discipline. N.J. Ct. Rule 1:20-9(c)(3). Hence, public admonitions have replaced private reprimands.

Where the hearing of an ethics complaint alleging misconduct is expected to last more than three days, or where the interests of justice so require, the Director of the OAE may request designation of a special ethics master to try the case. N.J. Ct. Rule 1:20-6(b)(4).

At the second level of review, a grievant has a right of appeal to the DRB where a complaint is dismissed by an Ethics Committee. Where an Ethics Committee determines that misconduct has occurred, the Committee's report and recommendation are forwarded to the DRB for the Board's consideration. If the Board determines that a public admonition constitutes adequate discipline, it issues a letter of admonition. Where other discipline is recommended, the DRB schedules oral argument, at which the respondent may appear, as well as a representative of the Ethics Committee or the OAE. At this level of the

proceedings, an attorney respondent may submit a brief and appear for oral argument. N.J. Ct. Rule 1:20-15(f)(2). If the DRB determines that admonition, reprimand, suspension or disbarment is appropriate, its written decision is filed with the Supreme Court. The DRB's formal decision in the matter includes "findings of fact and conclusions of law as to each issue presented, and [the Board] shall make a specific determination as to the appropriate disciplinary sanction, if any, to be imposed." N.J. Ct. Rule 1:20-15(f)(3).

The third level of review occurs before the New Jersey Supreme Court. Except in disbarment matters where there is an automatic right of review by the Supreme Court, a disciplinary decision of the DRB is final on the entry of an appropriate order, unless the Supreme Court determines it wishes to review the matter. N.J. Ct. Rule 1:20-16(b). Supreme Court review is de novo on the record. N.J. Ct. Rule 1:20-16(c). Either the respondent or the OAE (which represents the public interest at all oral arguments before the Court) may request discretionary review in any case other than disbarment. If the Court decides to impose discipline, a written opinion or order is filed by the Court. Absent entry of a protective order pursuant to N.J. Ct. Rule 1:20-9(g), all hearings following the filing and service of a complaint before the Ethics Committees and all oral arguments before the DRB and the Supreme Court are public. Deliberations by the Ethics Committees, the DRB and the Supreme Court are private and confidential.

At any time following the commencement of a formal disciplinary proceeding, a respondent may seek interlocutory review of constitutional challenges raised before the trier of fact or the DRB by filing with the Supreme Court a motion for leave to appeal. N.J. Ct. Rule 1:20-16(f)(2).

B. Procedural Background Of Disciplinary Proceedings Relating to Petitioner

Petitioner, who was admitted to the Bar of the State of New Jersey in 1983, is not unfamiliar with the attorney disciplinary process in this State [1]. The disciplinary proceedings at issue in this matter were commenced before the District III B. Ethics Committee based upon a Complaint filed by the DEC charging plaintiff with violations of RPC 1.2(a) (failure to abide by a client's decisions about the objectives of the representation) and RPC 1.8(j) (obtaining a proprietary interest in the cause of action or subject matter of litigation). As noted above, the ethical violations, which came to light during a lawsuit that Petitioner brought against Mr. DeLuca were referred to the state ethics authorities by the district court judge to whom the litigation was assigned. *Steven Kramer v. Jon DeLuca*, Civil Action No. 90-0232 (JCL) (D.N.J. Aug. 31, 1990). (App. 48).

After conducting three days of hearings, in which Petitioner participated, the DEC unanimously found violations of RPC 1.8(j) and recommended that a period of suspension be imposed. (App. 23). The matter was then transmitted to the DRB, which held an additional hearing and conducted a de novo review of the record. Eight members of the Board voted to impose a six month suspension, and one member voted for a reprimand.

Pursuant to N.J. Ct. Rule 1:20-16(a), the Board's October 1, 1996 final decision was transmitted to the New Jersey Supreme Court. While the matter was pending before the New Jersey Supreme Court, Petitioner moved to expand the record to include evidence that a DRB member's law firm was his adversary in litigation wholly unrelated to the

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[1]Plaintiff has previously been the subject of attorney discipline. He was publicly reprimanded in 2993 for violating RPC 1.1(a), 1.3, 1.16(a)(3), 1.16(d) and 8.1(b). In re Kramer, 130 N.J. 536 (1993).

disciplinary proceeding, and that the presenter of the ethics charges against him at the DEC level served as a part-time judge in a vicinage in which DEC members practice. He later alleged that an adversary in unrelated litigation allegedly had an ex parte conversation with his father, New Jersey Associate Justice Gary Stein, in which the adversary purportedly complained that Petitioner had behaved unethically. In an Order dated April 23, 1997, the Court denied plaintiff's motion to expand the record. Plaintiff filed a petition for review of the Board's final decision with the Supreme Court, which was denied. See N.J. Ct. Rule 1:20-16(b). The Supreme Court adopted the Board's final decision, and entered the Suspension Order at issue on April 23, 1997 (App. 13). Associate Justice Gary Stein did not participate in the proceedings which resulted in the Court's issuance of the Suspension Order, or in the Court's denial of plaintiff's petition for review.

On April 28, 1997, Petitioner filed a complaint pursuant to 42 U.S.C. §1983 in the U.S. District Court for the District of New Jersey, in which he alleged that the Suspension Order violated the Privileges and Immunities, Due Process and Equal Protection Clauses of the United States Constitution. *Kramer v. New Jersey Supreme Court, et al.*, Civil Action No. 97-2251 (GEB), (D.N.J. July 7, 1997), appeal docketed No. 97-5448 (3d Cir. July 28, 1997). On July 7, 1997, the district court granted defendants' motion to dismiss the complaint on the basis that the *Rooker-Feldman* doctrine deprived the court of subject matter jurisdiction.

On July 21, 1997, Petitioner filed a Petition for a Writ of Certiorari in the United States Supreme Court. Seeking this Court's review of the April 23, 1997 Order of the Supreme Court of New Jersey imposing a six month suspension from the practice of law. (App. 13). Because of procedural deficiencies in the Petition, the Petition was not immediately docketed. Petitioner was granted additional

time within which to cure the deficiencies, and he filed a revised Petition on October 3, 1997.

SUMMARY OF ARGUMENT

Petitioner asserts that the attorney disciplinary proceedings resulting in a six-month suspension from the practice of law in the State of New Jersey violates the Supremacy, Due Process, Privileges and Immunities, and Equal Protection Clauses of the United States Constitution. The Petition for a Writ of Certiorari should be denied because it does not present any "compelling reasons" for review as set forth among the various criteria enumerated in *Sup. Ct. Rule 10.* Moreover, the New Jersey attorney disciplinary proceedings did not violate any provisions of the United States Constitution, as Petitioner was provided with ample opportunity to fully and fairly litigate his constitutional claims in those proceedings.

REASONS FOR DENYING THE PETITION

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE PETITION DOES NOT PRESENT COMPELLING REASONS FOR REVIEW.

Review of a petition for a writ of certiorari is not a matter of right, but of judicial discretion. *Sup. Ct. Rule 10.* "A petition for a writ of certiorari will be granted only for compelling reasons." *Ibid.* The considerations bearing on whether this Court will exercise its discretion are set forth in *Sup. Ct. Rule 10*, and include the following concerning petitions for review of state court decisions:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the

> decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. [Ibid].

The decision of the New Jersey Supreme Court was based upon a voluminous record containing clear and compelling evidence of Petitioner's ethical misconduct and does not violate any provision of the United States Constitution.

In recognition of the discretion that state courts must be accorded to regulate the conduct of attorneys appearing before them, this Court has been loathe to review state attorney disciplinary proceedings, even those applying the ultimate sanction of disbarment, except within narrow limits. *See Theard v. U.S.*, 354 *U.S.* 278, 281 (1957). The six month suspension at issue here does not fall within those narrow limits of review. None of the criteria set forth in *Sup. Ct. Rule 10* are satisfied. Accordingly, the Petition for a Writ of Certiorari should be denied.

II. THE RULES OF PROFESSIONAL CONDUCT APPLIED BY THE NEW JERSEY SUPREME COURT DO NOT VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

The Supremacy Clause of the United States Constitution requires invalidation of any state constitutional or statutory provision that conflicts with federal law. *Swift & Co. v. Wickham*, 382 *U.S.* 111, 120 (1965); *Gibbons v. Ogden*, 9 Wheat. 1, 6 *L.Ed.* 23 (1824). By virtue of the Supremacy Clause, "a state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a valid excuse," *citing Douglas v. N.H. & H.R. Co.*, 279 *U.S.* 377, 387-88 (1929) (Holmes, J.).

Contrary to Petitioner's assertions, the ethical rules applied by the New Jersey Supreme Court and the Disciplinary Review Board do not conflict with federal bankruptcy practice. The Bankruptcy Court that presided over Mr. DeLuca's bankruptcy proceedings was bound by the Local Civil Rules for the District of New Jersey. 28 *U.S.C.* §151. Local Civil Rule 103.1(a) provides:

> The Rules of Professional Conduct of The American Bar Association as revised by the New Jersey Supreme Court shall govern the conduct of the members of the bar admitted to practice in this Court, subject to such modifications as may be required or permitted by Federal statute, regulation, court rule or decision of law.

The conduct for which Petitioner has been suspended is violative of *RPC* 1.8(j), whether it took place in the context of a New Jersey bankruptcy proceeding or otherwise.

Moreover, in fashioning his argument that his conduct would not be proscribed under federal bankruptcy law, Petitioner fundamentally misstates his role in the DeLuca bankruptcy proceedings. As the DRB noted in its October 1, 1996 decision, Petitioner presented no documentation whatsoever to support his assertion that he was acting as special counsel to the DeLuca bankruptcy estate. This assertion was also refuted by the testimony of Jeffrey E. Jenkins, the attorney whom Petitioner engaged as principal bankruptcy counsel. In fact, Frank Lobosco, Esq., whom Petitioner retained as his bankruptcy expert in the disciplinary proceedings, stated in his testimony that he had been surprised to discover that no papers had ever been submitted to the Bankruptcy Court to appoint Petitioner as special counsel. In addition, Lobosco conceded that the Bankruptcy Court would no doubt have had serious concerns about whether it would be in the best interest of the estate to appoint someone as special counsel who had the attorney-client history that Petitioner had with Mr. DeLuca. (DRB Decision at 16-20).

Under the Bankruptcy Code, a bankruptcy trustee or debtor in possession cannot seek court approval to employ an attorney or any other professional who is not a "disinterested person." 11 *U.S.C.* §327(a), 1107(a). The May 18, 1989 amended retainer agreement between Petitioner and Mr. DeLuca, which stated "that no settlement negotiations of less than $100 M will take place without [Petitioner's] concurrence" clearly gave Petitioner a proprietary stake in the Newton-John litigation that is violative of both the Bankruptcy Code and the Rules of Professional Conduct. Accordingly, Petitioner's meritless argument that the Rules of Professional Conduct violate the Supremacy Clause must be rejected.

III. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE STATE DISCIPLINARY PROCEEDINGS.

As set forth more fully above, the disciplinary process for licensed New Jersey attorneys provides attorneys accused of misconduct with a full opportunity to raise and present constitutional challenges. Despite having availed himself of the opportunity to litigate these claims, Petitioner disingenuously claims that his due process rights were violated by raising frivolous and wholly unsubstantiated allegations of bias in the proceedings. Neither the New Jersey Supreme Court nor the intermediate disciplinary tribunals took any action to inhibit, deprive, or otherwise bar Petitioner from exercising his due process rights.

Petitioner raised the identical argument in his federal lawsuit challenging his six-month suspension, which was soundly rejected by the district court. As the court correctly reasoned:

> Plaintiff's contention merits little discussion. Plaintiff did, in fact, have a realistic opportunity to fully and fairly litigate his constitutional claims in the state court proceedings. As noted above, at any time following the commencement of a formal disciplinary proceeding, a respondent may seek interlocutory review of constitutional challenges raised before the trier of fact or the DRB by filing with the Supreme Court a motion for leave to appeal. *N.J. Ct. Rule* 1:20-16(f)(1). In addition, final review of constitutional challenges may be sought by filing in the Supreme Court a petition for review of a final order of discipline. *N.J. Ct Rule* 1:20-16(f)(2). The fact that the New Jersey Supreme Court's review of all

> decisions of the DRB in non-disbarment actions is discretionary does not change this analysis. *Vincent*, 1997 WL235126, at *6. Nor does the fact that the Supreme Court in this case denied plaintiff's motion to expand the record. Judicial review of constitutional claims is only inadequate where state procedural law bars presentation of federal claims. *Cf. Moore v. Sims*, 442 *U.S.* 15, 430 (1979); *Vincent*, 1997 WL235126 at *6. This not the case here. (*Kramer v. New Jersey Supreme Court, et al.*, Civil Action No. 97-2251(GEB), slip op. at 8 (D.N.J. July 7, 1997), appeal docketed, No. 97-5448 (3rd Cir. July 28, 1997)

It is axiomatic that due process consists of notice and an opportunity for a hearing "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 *U.S.* 306, 313 (1950). The requirements of due process "are not technical, nor is any particular form of procedure necessary." *Inland Empire Dist. Council v. Millis*, 325 *U.S.* 697, 710 (1945). "[N]o single model of procedural fairness, let along a particular form of procedure, is dictated by the Due Process Clause." *Kremer v. Chemical Const. Corp.*, 456 *U.S.* 461, 483 (1982). Recognizing the flexibility implicit in the concept of due process, this Court has held that administrative agencies should be "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *FTC v. Pottsville Broadcasting Co.*, 309 *U.S.* 134, 143 (1939). The due process protections

afforded to Petitioner were clearly appropriate to the nature of his disciplinary proceedings, especially where a lesser sanction than disbarment was involved, and Petitioner was given an opportunity for discretionary review of meritorious issues by the State's highest court.

IV. THE SIX MONTH SUSPENSION IMPOSED UPON PETITIONER VIOLATED NEITHER THE PRIVILEGES AND IMMUNITIES NOR THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTIONS.

Petitioner raises another frivolous constitutional challenge to his disciplinary proceedings by alleging that they "were motivated in part because of the Petitioner's N.Y. residence." (Brief at 32). Petitioner's argument is factually and legally unsupportable.

It is well settled that a state action such as Petitioner's disciplinary proceedings that does not implicate a suspect classification or a fundamental right merits only "rational basis" scrutiny, requiring only that there be some rational nexus between the state action and the legitimate state interest sought to be achieved. *San Antonio Independent School Dist. v. Rodriguez*, 411 *U.S.* 1, 16-17, 40 (1973). Furthermore, the right to pursue a skilled profession is protected only against arbitrary or wholly unreasonable interference by the State. *See Williamson v. Lee Optical of Oklahoma*, 348 *U.S.* 483, 488-90 (1955).

Even the most cursory examination of the voluminous record of Petitioner's disciplinary proceedings will demonstrate the reasonableness and fairness of a six month license suspension in right of clear and compelling evidence that Petitioner failed to abide by his client's clearly stated wishes to settle his lawsuit in contravention of Rule

1.2(a) of the Rules of Professional Conduct, and that Petitioner unethically acquired a proprietary interest in Mr. DeLuca's litigation in violation of Rule 1.8(j) by modifying his retainer agreement to include veto rights over settlement of the litigation. In imposing the six month suspension, the Disciplinary Review Board was guided not only by what it properly found to be Petitioner's "outrageous conduct," but by "his prior ethics history for similar conduct," a crucial fact that Petitioner conveniently ignores in his argument. (DRB Decision at 28). *See In re Kramer*, 130 *N.J.* 536 (1993).

CONCLUSION

For all the foregoing reasons, the respondent, the Supreme Court of New Jersey, respectfully requests that Steven Kramer's Petitioner for a Writ of *Certiorari* be denied.

Respectfully submitted,

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Dated: November 6, 1997